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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner

vs.

RAYMOND GALLAGHER,
Respondent

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE MICHIGAN COURT OF APPEALS AFFIRMATIVELY MISAPPLY CONTROLLING CASE LAW PRECEDENT RELATING TO THE GRANT OF A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF AN ALLEGED CONFLICT OF INTEREST WHERE SAID COURT UPHELD A GRANT OF NEW TRIAL AFTER FINDING ONLY A POTENTIAL AND NOT AN ACTUAL CONFLICT OF INTEREST.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner
vs.
RAYMOND GALLAGHER
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF MICHIGAN

NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by EDWARD REILLY WILSON, Deputy Chief, Civil and Appeals, and A. GEORGE BEST II, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above entitled cause on 19 May 1982.

A timely application for rehearing before said Court was made and denied on 6 July 1982. A timely application for leave to appeal was made to the Michigan Supreme Court and that court denied the petitioner any relief on 18 October 1982.

OPINIONS BELOW

On 19 May 1982 the Michigan Court of Appeals upheld a grant of new trial to this defendant on one of the two grounds enunciated by the trial court (the Court of Appeals found one ground to represent an abuse of discretion.) That opinion is appended hereto as Appendix A. A timely application for rehearing was made by petitioner and no relief was granted 6 July 1982. Appendix B. A timely application for leave to appeal was filed by petitioner in the Michigan Supreme Court, that Court denied any relief by order dated 18 October 1982. Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued 19 May 1982. The order of that Court denying an application for rehearing was issued on 6 July 1982. The order of the Michigan Supreme Court denying application for leave to appeal was issued on 18 October 1982. The jurisdiction of this Honorable Court is invoked under 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Defendant and a co-defendant were each charged in a two count information with first degree murder (MCL 750.316) and conspiracy to commit first degree murder (MCL 750.316, 750.157A). Each was represented by their own counsel.

Defendant was tried by jury and, in conjunction with a co-defendant, was convicted as charged. Defendant was sentenced to the legislatively mandated term of life imprisonment as to both counts in November 1979.

Defendant's trial counsel filed a motion for new trial. Defendant then retained new counsel who added several issues to the new trial motion, one being a claim that defendant had been denied the effective assistance of trial counsel due to an alleged conflict of interest springing from trial counsels earlier representation of another individual who was not a defendant in the present case.

Extensive hearings were held, and a new trial was granted in June 1980, the trial court finding that a conflict did exist. Appellate proceedings were brought by the People and a remand was ordered by the State Court of Appeals to take additional testimony. A new hearing was held at the conclusion of which the trial court again granted defendant a new trial, this time on two grounds; first, a conflict of interest denying effective assistance of trial counsel and, second, a "cumulation" of individually non-reversible trial errors which equalled a "miscarriage of justice". New trial grant was again given in October 1980.

The new trial hearings revealed that defendant's trial counsel had several years earlier represented an individual who was not a defendant here, in a federal narcotics case. That individual was now alleged by defendants new appellate counsel to be an "alternate suspect" to the crimes of which this defendant was convicted.

Police testimony indicated that at no time had they ever uncovered any evidence or "leads" pointing to this "alternate

suspect" as having had any involvement in the crimes charged agains: this defendant.

Testimony from trial counsel's private investigator indicated that even after some 400 hours of research and witness interviews, he had discovered no "links" between the crimes charged and the "alternate suspect" (9 July: 16, 29, 39; 24 Sept: 9-12, 17-18, 20-21; 24, 56)

Trial counsel testified that there was no conflict of interest, that he never had or obtained any evidence or information alluding to a "live" "alternate suspect"; that he never suppressed any such information and that he did not structure his presentation of the case or his preparation of it in such a manner as to shield this "alternate suspect". (24 Sept: 68-71, 74-75, 92, 132-136; 25 Sept: 85-88, 99-101, 113-114)

The "alternate suspect" testified that he had no involvement in the charged crimes and that he had had no contact with the defendant's trial counsel immediately prior to or during the trial of defendant. (28 Sept: 132-166)

The People sought leave to appeal such order, leave being granted by the State Court of Appeals. That court found an abuse of discretion by the trial court in holding that cumulative errors justified a new trial. That court noted that, "in fact, there has been absolutely no showing of trial error. We conclude, therefore, that the trial judge abused his discretion in granting a new trial and upon a miscarriage of justice." **People v Gallagher**, 116 Mich App 283, 299 (1982)

The Michigan Court of Appeals did however decide that the trial court had not abused its discretion in granting a new trial on the basis of ineffective counsel because,

> " ... the record does support a finding that defense counsel's former representation of an alternate suspect in this case "may" have inhibited counsel's directives concerning the investigatory process, which, in turn, "may" have

> affected counsels examination and cross-examination of witnesses and the manner in which the trial was conducted.
>
> * * *
>
> ... it is unclear whether defendant was ever informed of the potential conflict of interest ...

People v Gallagher, supra, 294.

The Court of Appeals concluded that,

> On the record, we are convinced that the trial court was correct in finding that a conflict of interest "may" have prejudiced the defendant's trial and that no valid waiver had occurred. **Gallagher, supra,** 295.

The Court of Appeals thus found only that a "potential" conflict of interest "may" have existed during defendant's trial.

A timely application for rehearing was denied by that court. The Michigan Supreme Court also denied the People any relief upon their review of the People's Application for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

THE MICHIGAN COURT OF APPEALS AFFIRMATIVELY MISAPPLIED CONTROLLING CASE LAW PRECEDENT RELATING TO THE GRANT OF A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF AN ALLEGED CONFLICT OF INTEREST WHERE SAID COURT UPHELD A NEW TRIAL AFTER HAVING FOUND ONLY A POTENTIAL AND NOT AN ACTUAL CONFLICT OF INTEREST.

The Michigan Court of Appeals was squarely presented with the question of whether there had been ineffective assistance of trial counsel based on an alleged conflict of interest springing from the years-prior representation by that counsel of an individual alleged (after trial) to be an "alternate suspect" in the crimes charged against defendant. The Michigan Court of Appeals reviewed the trial and post-trial record and upheld the new trial grant of the trial court. The People allege that that action was taken in total disregard of controlling United States Supreme Court precedents.

The basic question was whether defendant's Sixth Amendment rights were violated. The Sixth Amendment is applicable to the states via the Fourteenth Amendment. **Gideon v Wainwright**, 372 US 335, 9 L Ed 2d 799 (1963). Here, the Court of Appeals dealing with the Sixth Amendment, totally disregarded **Cuyler v Sullivan, 446 US 335, 64 L Ed 2d 333 (1980).**

The Court of Appeals in its opinion noted that,

> ... **record does support a finding that defense counsel's former representation of an alternate suspect in this case "may have inhibited counsel's directives** concerning the investigatory process which, in turn, **"may" have affected counsel's examination and cross-examination** of witnesses and the manner in which the trial was conducted.

> The most troublesome aspect of this case is that it is unclear whether defendant was ever informed of **the potential conflict of interest** and risks pursuant thereto and whether the defendant had consented to counsel's representation when and if such disclosure was made.
>
> On this record, we are convinced that the trial court was correct in finding that **a conflict of interest "may" have prejudiced the defendant's trial** and that no valid waiver had occurred.

People v Gallagher, 116 Mich App 283, 294-295 (1982) (emphasis added).

The correct standard as been succinctly and cogently set forth by the United States Supreme Court in **Cuyler v Sullivan, supra.**

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that **an actual conflict of interest** adversely affected his lawyer's performance.
>
> • • •
>
> ... until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.
>
> • • •
>
> We hold that **the possibility of conflict is insufficient to impugn a criminal conviction.** In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that **an actual conflict of interest** adversely affected his lawyer's performance. (346, 347, 348) (emphasis added).

This standard, one which requires the showing of an **actual,** presently extant, conflict of interest and not merely a "potential conflict" would mandate the reversal of the opinion of the Court of Appeals **and** of the trial court below.

What is readily apparent from a reading of the Court of Appeals decision is that it did **not** accept any trial court finding of an "actual conflict of interest." The very language utilized shows beyond peradventure that had the Court of Appeals utilized **Cuyler, supra,** they would have **reversed** the trial court and not affirmed it.

As noted in **United States** v **Zatjac**, 677 F 2d 61, 63 (CA 11, 1982),

> For a conflict of interest to cause ineffective assistance of counsel the conflict must be actual, not merely hypothetical or speculative. **Cuyler** v **Sullian**, (cite omitted); **United States** v **Fox**, F2d 99, 102 (CAS, 1980)

This principle has also been expressed with unmistakable clarity in numerous other cases; **United States** v **Martinez**, 630 F2d 361 (CA 5, 1980); **United States** v **Agosto**, 675 F2d 965, 970 (CA 8, 1982); **United States** v **Valenzuela**, 521 F2d 414, 416 (CA 8, 1975); cert den, 47 L Ed 2d 321 (1976); **Bailey** v **Redman**, 657 F 2d 21 (CA 3-1981); **Camera** v **Fogg**, 658 F 2d 80 (CA 2-1981); **Baty** v **Balkcom**, 661 F 2d 391 (CA 5-1981); **Dently** v **Lane**, 665 F 2d 113 (CA 7-1981); **Alexander** v **Housewright**, 667 F 2d 556 (CA 8-1981); **Daneils** v **Maggio**, 669 F 2d 1075 (CA 5-1982); **Davis** v **Franzen**, 671 F 2d 1056 (CA 7-1982)

The Sixth Circuit has recently expounded its view on this question and has reached an identical result.

> ... The **Cuyler** test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the

> processes of the Sixth Amendment made applicable to state proceedings by the Due Process Clause of the Fourteenth Amendment.
>
> • • •
>
> Appellants have not adduced evidence that counsel "actively represented conflicting interests" and the District Court's finding that there was no conflict of interest in this case is not clearly erroneous. The **Cuyler** court states that until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Smith v **Bordenkircher**, 671 F2d 986, (CA 6, 1982); **United States** v **Knight**, 680 F 2d 470 (CA 6-1982).

It is thus clear that the Court of Appeals here reversibly erred. It is also clear that a review of its decision shows that it found no actual conflict of interest thus requiring it to reverse the trial court below and set aside the grant of new trial.

The above was noted by the one Judge who dissented in **Gallagher, supra.**

> I respectfully dissent. Although the majority accepts the trial court's determination that a conflict of interest existed and focuses its attention on whether the conflict affected counsel's performance, I find no basis for concluding that a conflict was established.
>
> In order to establish ineffective assistance of counsel, defendant must demonstrate an actual conflict of interest which adversely affects his lawyer's performance. He must show that his counsel actively represented conflicting interests. **Cuyler** v **Sullivan**, 446 US 335; 100 S. Ct 1708; 64 L Ed 2d 333 (1980). The trial court was of the opinion that a conflict existed because counsel had

represented Mr. X on a prior occasion and because of an alleged personal relationship between the two. I find neither to be supported by the evidence.

* * *

Any conclusion that counsel actively represented conflicting interests because of this prior attorney-client relationship is based upon speculation and conjecture only, not upon the evidence. Counsel was not serving two masters. See **Olshen** v **McMann**, 378 F2d 993 (CA 2, 1967), **United States ex rel Kachinsky** v **Cavell**, 453 F2d 581 (CA 3, 1971) (counsel formerly represented a prosecution witness).

Counsel did not have two clients to whom he owed his undivided loyalty. He was not confronted with a situation where his efforts to protect the interests of one client would cause him to sacrifice the interests of the other client which he was also ethically obligated to protect. No actual conflict of interest existed because of counsel's former representation of Mr. X.

The trial court was also of the opinion that because of a continuing personal relationship between counsel and Mr. X, counsel sought to protect Mr. X at defendant's expense. I do not believe that the evidence justifies such a determination.

(299-301)

The Court of Appeals decision was also in conflict with prior Michigan authorities (which implicitly follow Cuyler supra)

In People v Green, 96 Mich App 104 (1980), the following situation obtained:

> At the preliminary examination, appointed counsel indicated to the court that he had represented the key prosecution witness in the past and that another member of his firm was presently representing the witness on a pending charge. Counsel stated that he had discussed the matter with the defendant, who had no objection to counsel conducting the preliminary examination. Counsel further stated that if the defendant were bound over for trial, he would withdraw as defendant's attorney. The examination commenced, and resulted in the defendant being bound over. Counsel promptly moved to and did withdraw.
>
> Defendant argues first that representation of a defendant and a key prosecution witness amounts to ineffective assistance of counsel per se. We decline to apply a per se rule under the facts of the present case. See **People** v **Van Brocklin**, 76 Mich App 427, 430; 257 NW2d 107 (1977). The facts underlying this declination are that counsel was not presently representing the witness, that the representation of the defendant took place at the preliminary examination and that defendant consented to such representation after having discussed the matter with counsel. We hold that absent some showing of prejudice arising from the conflict of interest, the defendant was not denied effective assistance of counsel. We further hold that no such prejudice was extant here. (107-108).

In that case, there existed an **actual** conflict of interest — one which was acknowledged by defense counsel and by the trial court. That **actual** conflict did not however prejudice the defendant in any degree. Defendant's conviction was affirmed.

In **People** v **Villarreal**, 100 Mich App 379 (1980), the court held that:

In order for ineffective assistance of counsel to result from shared counsel by co-defendants, there must be a showing of actual prejudice:

> "Specifically, a defendant is entitled to 'the undivided loyalty of his counsel'. **People** v **Gardner**, 385 Mich 392, 400; 189 NW2d 229, 234 (1971).
>
> "Where counsel have represented co-defendants, we have required a showing of actual prejudice before finding reversal warranted. **People** v **Jones**, 64 Mich App 659, 667-668; 236 NW2d 531, 536 (1975), **People** v **Marshall**, 53 Mich App 181, 189-190; 218 NW2d 847, 852 (1974); **People** v **Hilton**, 26 Mich App 274, 276; 182 NW 2d 29, 30 (1970). **This is because such relationships do not inevitably involve conflicts of interests. People** v **Hilton, Supra.**" **People** v **Van Brocklin**, 76 Mich App 427, 430; 257 NW2d 107 (1977).
>
> See also **Holloway** v **Arkansas**, 435 US 475, 482; 98 S. Ct 1173; 55 L Ed 2d 426 (1978). (389-390) (emphasis added).

Again, an **actual conflict** of interest was affirmatively found to exist.

In **People** v **Mendez**, 101 Mich App 735 (1980), the court held that,

> Defendant first argues that he was deprived of effective assistance of counsel by the joint representation of all of the defendants by retained counsel. At the insistence of the prosecutor several purported waivers were made by the defendants of any claim of conflict arising out of the multiple representation. The dispute over the validity of these waivers need not be addressed by this court with regard to defendant Mendez because a review of the transcript in this case indicates that defendant Mendez was not prejudiced

> by the multiple representation of himself and his codefendants by retained counsel.
>
> In order for ineffective assistance of counsel to result from shared counsel by codefendants there must be a showing of actual prejudice. **People** v **Van Brocklin**, 76 Mich App 427; 257 NW2d 107 (1977) (736-737) (emphasis added).

Again, actual prejudice springing from an **actual** conflict of interest must exist prior to any relief being granted.

In **People** v **Aquilar**, 105 Mich App 258 (1981), the defendant argued that there existed a conflict of interest from joint representation. After a full review no such **actual** conflict was found, the conviction was affirmed.

In **People** v **Clark**, 106 Mich App 771 (1981), the court held:

> Joint representation of defendants, however, does not always lead to a conflict of interest of such magnitude as to warrant reversal. Where an attorney has represented two or more codefendants at one trial, **this Court has required a showing of actual prejudice as a prerequisite for finding reversible error. People** v **Jones**, 64 Mich App 659; 236 Nw2d 531 (1975), **People** v **Hilton**, 26 Mich App 274; 182 NW2d 29 (1970) (emphasis added).

In **People** v **Bentley**, 402 Mich 121 (1978) the Supreme Court of Michigan stated,

> The Defendant-Appellant's ... trial attorney also represented a co-defendant with conflicting interest. (122).

The Supreme Court **did not find** that the trial counsel "may" have had conflicting considerations or that there was a "possibility" of a conflict of interest. They specifically and

directly and expressly found an **actual**, presently extant conflict which, having been found to exist, did "result in at least some prejudice to Bentley" (123). **Bentley** itself is thus authority for a result which is directly opposite to that reached by the Court of Appeals in this instant case. (The clear import of **Bentley** was again recognized, and reaffirmed, in **People** v **Gardner, 406 Mich 369 (1979).**

CONCLUSION

Inasmuch as the Michigan Courts recognize that "in matter of Federal constitutional interpretation our fealty is to the United States Supreme Court", the People request that this Honorable Court direct compliance with its binding precedents. **People** v **Hoffman**, 81 Mich App 288, 298 (1978); **People** v **Drielick**, 400 Mich 559, 567 (1977)

WHEREFORE the People respectfully request that this Honorable Court grant this Petition.

Respectfully submitted,

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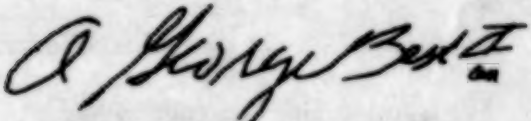

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APPENDIX A

PEOPLE v GALLAGHER

Docket No. 54497. Submitted June 12, 1981, at Detroit. - Decided May 19, 1982.

Before: D.C. Riley, P.J., and Cynar and H.R. Gage, JJ.

D.C. RILEY, P.J. On November, 1978, defendant was charged, along with codefendant Henry Hence, Jr., with first-degree murder, MCL 750.316; MSA 28.548, and conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1). Also named as coconspirators, but not codefendants, were Phillip Edmonds and Norman Robinson. Following a lengthy joint jury trial, both defendants were convicted as charged. On November 29, 1979, defendant Gallagher was sentenced to concurrent terms of life imprisonment on each count. The people appeal from an order granting defendant a new trial. Defendant Hence has appealed his conviction separately.

This case arose from the fatal shooting of Leon Sommers on May 11, 1978, at his home in Taylor, Michigan. The victim was found lying on a couch in the living room of his home with his hands bound behind his back. He had been shot through the head four times at close range.

The transcript reveals that Sommers was allegedly involved in stolen auto parts and/or drug trafficking in the downriver Detroit area. Many of the trial witnesses were allegedly involved in these illegal activities, as were defendant and codefendant Hence.

Five weeks prior to Sommers's death, defendant was convicted of interstate transportation of a stolen motor vehicle by an Ohio federal district court, bsed largely on the testimony of Sommers. The prosecution's theory in the instant case was that between April 18, 1978, and May 13, 1978 (i.e., postconviction and presentencing on his federal conviction), a conspiratorial meeting was held at which Gallagher, outraged by Sommer's

testimony against him, hired Phillip Edmonds, who in turn hired Robinson and Hence, the "hit men", to kill Sommers.

According to defense counsel, the defense strategy was to establish that defendant was not guilty beyond a reasonable doubt. This was sought to be accomplished in three ways. First, defendant denied any complicity in the conspiracy to kill Sommers. While he admitted that he attended a meeting with some of the "conspirators", defendant claimed that the purpose of the meeting was not to plan a murder but to arrange the theft of a car. Second, defendant sought to show that the prosecution witnesses were not credible in their rendition of the events which occurred. Finally, while not attempting to "prove" who actually arranged the contract on Sommers, defendant attempted to show that others had a motive to kill Sommers.

Following his conviction, defendant's trial counsel moved for a new trial alleging, essentially, a miscarriage of justice and newly discovered evidence. Trial counsel was then replaced by present appellate counsel who obtained permission to review the trial record for additional potential error.

Appellate counsel subsequently filed a series of amended motions for new trial. Although these motions alleged numerous trial errors, the decisive issue, and the issue upon which this appeal hinges, concerned whether defendant was denied the effective assistance of counsel due to an alleged conflict of interest between defense counsel and Mr. X, a former client. The motion alleged that defense counsel failed to investigate the possibility that Mr. X ordered the "hit" on Sommers and that defense counsel failed to present Mr. X adequately as an "alternate suspect".

The various motions for new trial were argued by defendant's appellate counsel at hearings held in early July, 1980. Defendant's trial counsel, although informed of the hearings, failed to appear. Approximately 12 witnesses testified at the hearing, including trail counsel's investigator.

In an oral opinion rendered July 15, 1980, the trial judge granted the motion for a new trial based on the ground that

counsel's conflict of interest had denied defendant effective assistance of counsel. While specifically noting that his finding of ineffective assistance of counsel did not result from any want of skill on the part of counsel, he nevertheless concluded that there was "strong evidence" showing that defense counsel had managed and shaped the preparation of the defense at trial so as to shield his former client, Mr. X.

This Court initially denied the people's application for leave to appeal but on rehearing granted a remand for the taking of additional testimony, especially that of trial counsel. Following the remand hearing, which took place in September, 1980, the trial judge filed a written opinion in which he reaffirmed his belief that a new trial was necessary. This decision was based on two grounds (1) that defense counsel failed to provide defendant effective assistance of counsel as a result of a conflict of interest, and (2) that a miscarriage of justice had occurred. The people have brought this appeal by leave granted, GCR 1963, 806.2, challenging the propriety of the grant of a new trial.

At the September remand hearing, trial counsel testified that he had known an individual by the name of Mr. X since high school and that he had represented him in 1975 and 1976 in a federal narcotics case. The record also reflects that trial counsel had had several social contacts with Mr. X.

The most crucial testimony, and that which the trial judge appears to have afforded the greater weight, came from the trial counsel's investigator who interviewed 40 or more witnesses during his investigation and had put approximately 400 hours of actual work into the project.

A major area of inquiry, with regard to the investigator, concerned the initial strategy meeting which had taken place in March of 1979, shortly after trial counsel employed the investigator. According to the investigator, by the time of the strategy meeting, he had already interviewed one witness who claimed that Mr. X possibly may have been involved in the killing of Sommers. It appears to be undisputed, therefore, that by the time of the initial strategy meeting, the name of Mr. X

had surfaced as at least a possible participant in the Sommers killing.

The investigator testified that trial counsel first directed him to ascertain exactly what happened at the so-called conspiratorial meetings and to locate and interview the participants who allegedly were there. Further, the investigator testified that counsel told him not to pursue inquiries regarding Mr. X. In addition, on cross-examination, it was established that defendant had provided the investigator with certain information regarding Mr. X, information which reasonably inferred that Mr. X also had a motive to kill Sommers. This information, the investigator claimed, was forwarded to defense counsel. It also appears undisputed that trial counsel told the investigator that Mr. X was not the "killer type" in counsel's opinion and that counsel never expressly told the investigator to investigate Mr. X.

Trial counsel vigorously denied that his former representation of and social contacts with Mr. X in any way prevented him from zealously representing defendant. He testified that he told defendant, during his first prison visit with defendant, that he had represented Mr. X prior to defendant's case. According to counsel, during the various interviews he had with defendant, defendant never told him whom he believed ordered the killing although defendant did constantly suggest alternate suspects. In short, counsel defended his actions as constituting legitimate trial strategy. He denied any cover-up or conflict of interest.

In his written opinion, the trial judge concluded that a conflict of interest did arise at the time counsel received information that Mr. X very well may have been involved in the conspiracy to kill Sommers and at the time was the principal "alternate suspect." In the judge's opinion, it was clear that pursuing Mr. X as an "alternative suspect" would jeopardize Mr. X's interests, and to not pursue Mr. X as an alternative suspect would jeopardize defendant's interests.

To substantiate his conclusion, the trial judge noted the following examples of the extent to which trial counsel's

defense of Gallagher was deflected by his concern for protecting Mr. X. First, he noted that, although counsel had sufficient information from several sources which pointed toward Mr. X as the principal alternate suspect, he nevertheless instructed his investigator to pursue no leads implicating Mr. X. In addition, he noted other instances where Mr. X's name had surfaced during the investigation, in spite of the directives from trial counsel to focus the investigation on other areas and, again, the thrust of the investigation, pursuant to counsel's initial directives, remained unchanged. The trial judge held that a lawyer of ordinary training and skill, having in his possession the host of leads and information arising before trial pointing toward Mr. X, would certainly have seen to it that the information and leads were fully investigated.

Second, the judge pointed out that trial counsel avoided focusing suspicion on Mr. X during the trial. In support of this conclusion, the judge noted that substantial evidence which could have been introduced at trial about the alternative mastermind of the conspiracy showing that person to be a real person, namely Mr. X, was ignored.

Third, the judge noted in his opinion that trial counsel was less than candid with his law firm associate, who spent a good deal of time preparing the case for trial, insofar as he failed to inform the associate of his prior relationship with Mr. X and how Mr. X might have fit into the case, based on information supplied during the investigation. In this regard, the judge noted that it appeared that counsel purged his office file of any information tending to implicate Mr. X before providing the same to his associate.

Having concluded that defendant had not received effective assistance of counsel, the judge proceeded to a discussion of whether the error could be considered harmless. He concluded it could not and granted the motion for a new trial.

The remainder of the opinion addressed the multiple remaining claims which had been originally raised in the various motions for a new trial. Addressing the items one by one, he found that each asserted error was insufficient to result in a

new trial. In many instances, however, he theorized that the adminstration of justice would have been better served had the particular factual situation not occurred. Using this analysis, he concluded that there had been a miscarriage of justice and that defendant was entitled to a new trial. MCL 770.1; MSA 28.1098.

The first issue on appeal is whether the trial court abused its discretion in granting a new trial based on ineffective assistance of counsel.

As a general rule, the grant or denial of a motion for a new trial rests within the sound discretion of the trial court. Absent an abuse of that discretion, this Court will not interfere with the decision on appeal. **Willett** v **Ford Motor Co**, 400 Mich 65, 70-71; 253 NW2d 111 (1977). In **Benmark** v **Steffen**, 9 Mich App 416; 157 NW2d 468 (1968), this Court adopted the following criteria for determining whether, in the case of the grant of a new trial, there has been a proper exercise of discretion:

> "It is suggested that the most logical way to test the trial court's decision is to inquire, first, whether the reasons assigned by the court for granting a new trial are legally recognized ones. *** The second part of the test is whether the reasons assigned by the trial court are supported by any reasonable interpretation of the record." **Benmark, supra**, 422. (Citations omitted.)

The **Benmark** criteria were approved by the Supreme Court in **Kailimai** v **Firestone Tire & Rubber Co**, 398 Mich 230, 232; 247 NW2d 295 (1976), and again, more recently, in **Willett, supra.**

There can be no doubt that the first prong of the **Benmark** test is satisfied in the instant case. The ground stated, ineffective assistance of counsel, is a legally recognizable basis for the grant of a new trial. See **People** v **Garcia**, 398 Mich 250; 247 NW2d 547 (1976). The remaining question, then, is whether the finding of ineffective assistance of counsel, based upon a factual finding of a conflict of interest, is supported by any reasonable interpretation of the record.

In **People** v **Garcia, supra,** the Michigan Supreme Court rejected the former "sham" test for finding ineffective assistance of counsel in favor of a test enunciated in **Beasley** v **United States,** 491 F2d 687, 696 (CA 6, 1974). The **Beasley** test provides as follows:

> "Defense counsel must perform at least as well as a lawyer of ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations." (Emphasis added.)

Ineffective assistance of counsel can be proven by a second avenue as well. Where defense counsel's actions at trial produce a "serious error but for which defendant would have had a reasonable likelihood of acquittal", ineffective assistance will also be found to have been established. **People** v **Garcia, supra, People** v **Knight,** 94 Mich App 526, 528; 288 NW2d 649 (1980).

In the instant case, the claim appears to be that defense counsel's professional judgment was deflected due to preexisting loyalty to a former client and that, as a result, counsel failed to investigate a potentially substantial defense available to defendant. **Beasley** v **United States, supra,** 696.

This case presents an unusual factual situation since the asserted conflict of interest does not arise out of the joint representation of multiple defendants in a criminal trial, as is typically the claim, but rather involves a claim that a conflict of interest exists due to the representation of a former client who is somehow purportedly involved in the present litigation. Although the two situations described above are factually distinguishable, the legal question presented in each, i.e., whether the resulting conflict of interest served to deprive the defendant of the effective assistance of counsel, is essentially the same. In either situation, the concern is that a defendant is entitled to the undivided loyalty of his counsel, **People** v **Gardner,** 385 Mich 392, 400; 189 NW2d 229 (1971), and that loyalty may be compromised when a lawyer, wittingly or unwittingly, is placed in the precarious position of having to serve two masters, each of whom has differing interests.

We are of the opinion that a recent Michigan Supreme Court decision dealing with the conflict of interest issue is applicable in the instant case. The question in **People** v **Bentley**, 402 Mich 121; 261 NW2d 716 (1978), was whether the defendant was denied his right to counsel because his trial attorney simultaneously represented a codefendant with conflicting interests. Both defendants made pretrial motions for separate trials on the grounds that a witness had confused the two defendants in earlier identifications and that the defenses of the two generally were so divergent that separate trials were mandated. The trial judge denied the motions and a panel of this Court affirmed.

On appeal, the Supreme Court reversed, holding that **Bentley** was denied his right to effective assistance of counsel since the joint representation at trial of defendant and codefendant by the same attorney "may" have inhibited the defense attorney's cross-examination of an eyewitness, an argument that the codefendant's link to incriminating evidence was stronger than defendants link to the evidence "might" have been but was not made, and an argument potentially prejudicial to the codefendant stressing the greater reliability of lineup identification "might" have helped the defendant. **People** v **Bentley, supra**, 123.

In **People** v **Browning**, 407 Mich 920 (1979), Justice LEVIN, dissenting from a decision of the Court denying leave to appeal, summarized the Court's holding in **Bentley** as follows:

> "For all the **[Bentley]** Court knew, the defense attorney may have had perfectly sound independent reasons for forgoing the possible alternative strategies. Nonetheless, this Court said that since the judge did not attempt to determine if the defendant was aware of the potential conflicts and prejudice arising from joint representation, thereby precluding an inference of a voluntary and informed waiver, no actual prejudice or effect on defense counsel's trial strategy need be shown to support a finding of denial of the right to effective assistance of counsel." **People** v **Browning, supra**, 923.

As in **Bentley, supra,** the record does support a finding that defense counsel's former representation of an alternate suspect in this case "may" have inhibited counsel's directives concerning the investigatory process, which, in turn, "may" have affected counsel's examination and cross-examination of witnesses and the manner in which the trial was conducted.

The most troublesome aspect of this case is that it is unclear whether defendant was ever informed of the potential conflict of interest and risks pursuant thereto and whether the defendant had consented to counsel's representation when and if such disclosure was made. Although this issue was disputed in posttrial proceedings, what is clear is that the trial court was not aware of or did not recognize the conflict of interest until after the trial was concluded and thus did not explain to defendant the risks of counsel's representation at trial.

On this record, we are convinced that the trial court was correct in finding that a conflict of interest "may" have prejudiced the defendant's trial and that no valid waiver had occurred. Although counsel himself may have been completely convinced in his own mind that he could adequately represent defendant without regard to his former client, **Bentley** requires that the ultimate decision be made, not by counsel, but by the defendant himself on the record after being advised by the trial court of all the possible dangers of such representation. As the United States Supreme Court held in **Glasser** v **United States,** 315 US 60, 71; 62 S Ct 457; 86 L Ed 2d 680 (1942):

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. *** 'While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record.' **Johnson** v **Zerbst,** 304 US 458, 465; 58 S Ct 1019, 1023; 82 L Ed 1461 [1937]." (Emphasis added.)

We conclude, therefore, that the trial judge did not abuse

his discretion in granting defendant a new trial based on ineffective assistance of counsel. The trial judge in this lengthy involvement was on the firing line, observed the witnesses, and was in a better position to weigh the proofs and consider credibility.

The second issue on appeal is whether the trial judge abused his discretion in granting a new trial based on a finding of a miscarriage of justice, MCL 770.1; MSA 28.1098. Although our resolution of the first issue makes it unnecessary for us to reach the merits of this issue, we feel compelled to do so since we are firmly convinced that the judge abused his discretion in granting a new trial based on this ground.

MCL 770.1; MSA 28.1098, states:

> "The court in which the trial of any indictment shall be had may grant a new trial to the defendant, for any cause which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct."

The decision whether to grant or deny a motion for new trial is entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion. **People** v **Andrews**, 360 Mich 572; 104 NW2d 199 (1960).

The discretion afforded trial judges pursuant to the above-cited statute is not, however, without limits and must amount to more than a whimsical **ipse dixit**. As this Court held in **People** v **Williams**, 93 Mich App 236, 244; 287 NW2d 184 (1979):

> "Not every irregularity in a trial justifies the granting of a mistrial or new trial but only where it is clearly established that the error resulted in prejudice sufficient to deprive the defendant of a fair and impartial trial. **People** v **Nick**, 360 Mich 219; 103 NW2d 435 (1960), **People** v **Watson**, 307 Mich 596; 12 NW2d 476 (1943), **cert den** 323 US 749; 65 S Ct 81; 89 L Ed 600 (1944)."

In his written opinion, the trial judge considered ten allegations of error which, according to the defendant, required either dismissal or reversal.

The first claimed error concerned the court's taking of evidence outside the presence of the defendant. The evidence in question related only to the people's case against codefendant Hence and in no way affected Gallagher. In his opinion, the trial judge concluded that there was "simply no possible way in which Gallagher could have been prejudiced by the taking of this testimony in his absence". Although finding no error, the judge concluded it would have been "better" to have taken the evidence in Gallagher's presence.

The second claimed error centered around the judge's absence from the courtroom on the final days of jury deliberations. In his opinion, the judge first determined that any objection to his absence had been waived by the parties but further concluded that "there was no reversible error since Gallagher was not prejudiced by my absence". After citing ample authority in support of his conclusion that his absence had not caused any prejudice, he nevertheless concluded that the administration of justice would have been better served had he been present.

The third ground urged by the defendant for a new trial was based on a claim of newly discovered evidence. The record reveals, as the judge's opinion notes, that the claimed "newly discovered evidence" was not in fact newly discovered. In addition to not being newly discovered, however, the judge noted that the evidence would be inadmissible hearsay and, even if not inadmissible, would be "unlikely to bring about a different result on new trial".

The fourth ground urged by defendant for a new trial centered around the judge's decision to permit Norman Robinson to testify. At trial, the claim had been made that his testimony was induced by an unlawful agreement between himself and the prosecutor. In both his July 15 oral opinion and in his written opinion of October 30, the judge concluded that a new trial was not warranted on this ground since no error had occurred.

The next two claims of error revolved around the assertion that the prosection witnesses were inherently incredible. In his written opinion, the judge concluded that the claimed error was meritless.

The seventh argument addressed in the written opinion concerned whether the judge abused his discretion in placing a 1½ hour time limitation on closing arguments. After stating several times that he acted well within his discretion in limiting closing argument, and specifically noting that "[Gallagher] has not demonstrated any prejudice that resulted from either the short period of notice or the 1½ hour limit itself", he nevertheless concluded that "justice would have been better served" if he had given defense counsel greater advance notice of the time limit.

The eighth allegation of error was the prosecutorial misconduct required a new trial. In his oral opinion of July 15, the judge concluded that he was convinced "beyond a reasonable doubt" that defendant suffered no prejudice and that no error occurred requiring dismissal. The judge reaffirmed this position in his written opinion.

The ninth alleged error asserted that defendant was prejudiced in having a substitute judge deny his motion for a mistrial during jury deliberations. In his opinion, the judge concluded that "Gallagher can hardly claim now that it was reversible error for a judge other than myself to handle the jury", yet concluded that "it would have been better had I been present" to hear the mistrial motion.

The final "claim of error" was a ground which the judge appears to have raised **sua sponte**. It concerned testimony of Phillip Edmonds to the effect that killing Sommers would be like "icing on the cake". While we agree that this was relevant in considering whether there had been a miscarriage of justice, we cannot agree that these few statements are of such magnitude to reflect a miscarriage of justice by themselves.

We have detailed the findings and conclusions of the trial judge in order to show that his ultimate finding of a miscarriage of justice was clearly an abuse of discretion. Not only did

the judge conclude that none of the allegations complained of resulted in error, but he further concluded that defendant was not prejudiced by any of the procedures employed at trial. In short, as in **People** v **Williams, supra**, 244, the defendant here has made absoultely no showing of actual prejdice. In fact, there has been absolutely no showing of trial error. We conclude, therefore, that the trial judge abused his discretion in granting a new trial based upon a miscarriage of justice.

We affirm that part of the trial court's decision granting defendant a new trial based on a finding of ineffective assistance of counsel but reverse that part of his decision finding that justice had been miscarried.

CYNAR, J., concurred.

H.R. GAGE, J. (concurring in part and dissenting in part). I respectfully dissent. Although the majority accepts the trial court's determination that a conflict of interest existed and focuses its attention on whether the conflict affected counsel's performance, I find no basis for concluding that a conflict was established.

In order to establish ineffective assistance of counsel, defendant must demonstrate an actual conflict of interest which adversely affects his lawyer's performance. He must show that his counsel actively represented conflicting interests. **Cuyler** v **Sullivan**, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980). The trial court was of the opinion that a conflict existed because counsel had represented Mr. X on a prior occasion and because of an alleged personal relationship between the two. I find neither to be supported by the evidence.[1]

There can be no question that, at all times relevant to the case at bar, counsel was not retained by Mr. X in any professional capacity, particularly in any matter connected to this action. Although counsel had previously represented Mr. X in an

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[1] Although the trial court's opinion is rather long, consisting of 80 pages, its treatment of this initial question is very short, consisting of approximately 7 pages only.

unrelated matter, that relationship had terminated well before counsel was retained to represent defendant in the instant case. Further, defendant presented no evidence indicating that counsel acquired any information during the course of his representation of Mr. X which might have been favorable to defendant but which counsel was preculded from using at trial because of any ethical obligation to Mr. X. Finally, defendant failed to present any evidence from which it could be inferred that counsel has received or, at the time of trial, anticipated receiving any further business from Mr. X. Any conclusion that counsel actively represented conflicting interests because of this prior attorney-client relationship is based upon speculation and conjecture only, not upon the evidence, 378 F2d 993 (CA 2, 1967), **United States ex rel Kachinsky** v **Cavell**, 354 F2d 581 (CA 3, 1971) (counsel formerly represented a prosecution witness).

The absence of the attorney-client relationship distinguishes the case at bar from **People** v **Bentley**, 402 Mich 121, 261 NW2d 716 (1978), relied upon by the majority. The dangers inherent in joint representation cases are simply not present here. Counsel did not have two clients to whom he owed his undivided loyalty. He was not confronted with a situation where his efforts to protect the interests of one client would cause him to sacrifice the interests of the other client which he was also ethically obligated to protect. No actual conflict of interest existed because of counsel's former representation of Mr. X.

The trial court was also of the opinion that because of a continuing personal relationship between counsel and Mr. X, counsel sought to protect Mr. X at defendant's expense.[2] I do not believe that the evidence justifies such a determination.

---

[2] It should be noted that no evidence was presented indicating that Mr. X was seriously considered or investigated as a suspect by the police. The assertion that he was involved in the conspiracy came primarily from defendant and Phillip Edmonds, a coconspirator who was granted immunity from prosecution in return for his testimony. Counsel's investigator testified that Edmonds had given conflicting statements to the police and that it was his opinion that Edmonds was a liar.

The evidence indicated that counsel knew of Mr. X during high school because each lived in the same community. They did not attend the same high school. There was no evidence that they developed any type of personal raltionship at that time which carried over to the time of defendant's trial. The trial court stated in its opinion that both counsel and Mr. X were in their early forties at the time of trial. Clearly, a good deal of time had passed since each was in high school. This factor does not demonstrate the existence of an actual conflict of interest.

There was also evidence that counsel and Mr. X had dinner on one occasion during the time that counsel represented him on the federal narcotics charge and that because of similar interests they happened, upon a couple of occasions, to be at the same social gatherings. The evidence showed that on these occasions numerous other people were also present. None of these social events took place during the course of counsel's representation of defendant. Defendant failed to meet his burden of establishing an actual conflict of interest simply by showing these limited social contacts. Were such the case, members of the bench and bar would constantly have to be aware of who is present at the social gatherings they attend because their presence may someday result in a finding of ineffective assistance of counsel.

In addition to the above evidence the trial court also placed a great deal of emphasis on the testimony of counsel's investigator to find that a conflict of interest existed. A review of the testimony in its entirety does not justify a conclusion that counsel prevented his investigator from pursuing Mr. X should the evidence warrant it. The investigator testified that, had he obtained any evidence of Mr. X's involvement which he believed to be credible, he would have pursued it. He testified that he found no such evidence, despite the fact that he interviewed 40 or more witnesses and put approximately 400 hours of actual investigative work into the project. The trial court noted in its opinion that the investigator had a great deal of training and experience in his field, including 20 years as an agent with the Federal Bureau of Investigation. He was clearly in a better position than the court to determine whether a particular matter should be pursued. Counsel's actions resulted from the in-

formation obtained during the investigation and not from any personal relationship with Mr. X.

I also wish to express my concern with what I perceive to be a rule of law advanced by the majority. I interpret the majority opinion as finding ineffective assistance of counsel upon its belief that the defense could have been more effective but for the possible conflict of interest. Counsel's representation was masterful and effective. I dare say that a case shall never exist where an unsuccessful defendant or a reviewing court cannot justifiably argue that a more effective defense may have been presented had some other course been followed. The role of the courts, however, is not to second-guess trial counsel, determine what in hindsight it believes to be a more proper course and then find that counsel was ineffective for his or her failure to follow that course. If as a matter of trial strategy counsel chooses an avenue of defense which he or she believes will be successful and effectively pursues that defense, neither the trial court nor this court should deem such representation to be ineffective because of a belief that a different avenue may have been even more effective. **People** v **Crosby**, 19 Mich App 135; 172 NW2d 506 (1969), **People** v **Mays**, 64 Mich App 453; 236 NW2d 513 (1975), **People** v **Penn**, 70 Mich App 638; 247 NW2d 575 (1976). In the case at bar counsel sought to advance the theory that any discussions between defendant and the other alleged conspirators concerned the theft of an automobile, not the murder of Sommers. Counsel also sought to attack the credibility of those witnesses who testified against defendant. Given the back ground of these individuals such an approach was one that a skilled attorney could reasonably and logically follow.

As with virtually any case, several avenues of defense were available. Counsel chose those avenues which he believed would most likely be successful based upon the information obtained through his investigation. Just as a reviewing court is very reluctant to second-guess a trial court on a matter involving the exercise of its discretion, so too should the courts be equally reluctant to second-guess trial counsel on a matter involving legitimate trial strategy. Counsel's representation of defendant was effective.

I concur with the majority's determination that no miscarriage of justice was demonstrated. Defendant's conviction should be affirmed.

APPENDIX B

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the thirtieth day of June in the year of our Lord one thousand nine hundred and eighty-two.

Present the Honorable

DOROTHY COMSTOCK RILEY
Presiding Judge

WALTER P. CYNAR,
HILDA R. GAGE,
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Docket #54497
L.C. #79-911862 FM

v

RAYMOND GALLAGHER,
Defendant-Appellee.

In this cause plaintiff-appellant has filed an application for rehearing of this Court's opinion released May 19, 1982, and defendant-appellee has filed an answer in opposition thereto together with a motion for immediate consideration of appellant's application for rehearing, and appellant having filed an answer to the motion for immediate consideration, and due consideration of the foregoing having been had by this Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application for rehearing be, and the same is hereby DENIED.

Judge Gage votes to grant the application for rehearing.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 6th day of July in the year of our Lord one thousand nine hundred and eighty-two.

SEAL /s/ Ronald L. Dzierbicki, Clerk

APPENDIX C

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 29th day of June in the year of our Lord one thousand nine hundred and eighty-two.

69858
(71) (80) (81)

Present the Honorable

MARY S. COLEMAN
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

SC:69858
COA:54497
LC:79-911862-FM

v

RAYMOND GALLAGHER,
Defendant-Appellee.

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motion for bail pending appeal or for dissolving stay of proceedings becomes moot thereby, and is DENIED.

1012

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of October in the year of our Lord one thousand nine hundred and eighty-two.

SEAL /s/ Jacqueline B. Morse, Deputy Clerk

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

82-883

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner,

-vs-

RAYMOND GALLAGHER,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

RESPONDENT ADOPTS THE QUESTION PRESENTED BY PETITIONER.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

NOW COMES the respondent, Raymond James Gallagher, by and through his attorney, ROBERT H. ROETHER, and hereby prays that this Honorable Court deny the petitioner's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

That respondent accepts the statement of constitutional provisions involved as set forth by petitioner.

COUNTER-STATEMENT OF FACTS

Respondent accepts the jurisdictional portions of petitioner's Statement of Facts. However, the factual recitation by petitioner of testimony produced at new trial proceedings is misleading in that it mischaracterizes testimony and omits substantial portions of testimony adopted by the trial judge in his ruling.

One example is petitioner's assertion that trial counsel's former client, the alternative suspect to the defendant, had been represented by trial counsel several years before. Petitioner was harmed by making this misrepresentation in appellate proceedings in state court since petitioner had earlier stipulated that the alternative suspect had pled guilty only *weeks before* the homicide defendant was charged with and was also found to be still on probation for that charge even as late as the post-trial proceedings (stipulation by assistant prosecutor and present defense counsel, Tr. 7-9-80 p. 10).

Additionally, the most relevant testimony of the trial counsel's private investigator came when the investigator testified that he took information from two witnesses as to "leads" that the former client had been involved in the present homicide to defendant's trial counsel. He took leads

from two different witnesses and had leads pointing to no other individual other than the former client. (Tr. 7-9-80 pp. 16 & 17) For petitioner to draw some significance between the investigator saying that he had no "links" leading to the former client when he also testified that he had "leads" leading to the former client is specious. Of even more significance was the fact that the investigator testified that when he presented this information to trial counsel, that trial counsel instructed him not to pursue these leads any further and not to investigate the former client:

> "ROETHER: Then what, if anything, did Mr. Lippitt tell you regarding the, this, these leads relating to Burton Schwartz?
>
> INVESTIGATOR: Well, I discussed with Mr. Lippitt and Mr. Lippitt said he had defended Burton Schwartz in a drug case—I don't know exactly when; I believe it was not too long ago—and that he knew Schwartz and that he had a good reputation. He said that he could not be mixed up in this. He says don't go any further on that now." (Tr. 7-9-80 p. 46)
>
> "ROETHER: All right. And did you go any further after that point as far as investigating Burton Schwartz?
>
> INVESTIGATOR: No sir. (Tr. 7-9-80 p. 22)
>
> * * *
>
> ROETHER: Is it fair to say that after your conversation with Mr. Lippitt, you did not begin or you did not continue to investigate leads relating to Burton Schwartz?
>
> INVESTIGATOR: That's correct. (Tr. 7-9-80 p. 23)
>
> * * *
>
> INVESTIGATOR: When I related to Mr. Lippitt, who hired me, he said do not do anything further on Mr. Schwartz; I didn't." (Tr. 7-9-80 pp. 30-31)

Finally, trial counsel admitted that he instructed his investigator not to investigate the former client and had no

knowledge as to whether or not he had informed his present client of this decision (Tr. 9-24-80 p. 162). While trial counsel did not acknowledge "suppressing" any material leading to his former client, he did state that he was unable to articulate a good reason why he did not use such material as he did have (Tr. 9-24-80 pp. 175-177, pp. 86-89).

ARGUMENT—REASONS FOR DENYING THE WRIT

Michigan courts have not misapplied controlling case law relating to the grant of a new trial based on ineffective assistance of counsel due to a conflict of interest. The record in the Michigan courts is quite clear. Post-trial testimony before the trial judge consumed hundreds of pages of sworn testimony. The most significant testimony, as indicated by the Statement of Facts by both parties, involves testimony of defendant's former trial counsel, his investigator, and the contradicting testimony of the former trial counsel's law associate. Even more important, the trial judge is a widely recognized scholar and jurist. His opinion in this case exceeded 80 pages, half of which were devoted to the conflict of interest and its impact on defendant's trial.

There are two errors of analysis in petitioner's reasoning. One error is very readily ascertained by this court. While the Michigan Court of Appeal's opinion in this matter is somewhat more tepid than respondent would have wished given the strength of the record before the trial court, petitioner has simply misread or is misrepresenting the opinion of the Michigan Court of Appeals. Petitioner represents that the Michigan Court of Appeals found only that a "potential conflict of interest" "may have affected" defendant's trial. In virtually every instance in which the Michigan Court of Appeals referred to conflict of interest it used precisely that term—conflict of interest. As discussed below, the trial court most emphatically found an actual conflict of interest and a detrimental effect to the defendant's case. The Court of Appeals found that the trial court

was correct in this respect. The only instance in which the Court of Appeals made reference to a "potential" conflict of interest occurs in the second paragraph on page 26 of the petitioner's brief filed with this court. At this juncture, the Michigan Court of Appeals was discussing the fact that it was unclear whether or not defendant's trial counsel had ever informed defendant of the potential conflict of interest. The use of the term "potential" in that context is apt in that it was still a "potential" at that juncture. Had trial counsel informed the defendant when the conflict was still a "potential" one, defendant could have made an informed choice to either proceed with a waiver or seek other counsel.

The opinion of the Michigan Court of Appeals speaks for itself. This leads to the second error in analysis committed by petitioner. Petitioner's brief speaks of what it feels the Michigan Court of Appeals found and did not find relating to the facts. At least in the state of Michigan, appellate courts are not factfinders. They do not hear the case de novo. Rather, they examine the findings of the trial court to see if the evidence supports those findings. As the references to the trial court's findings below will indicate, the trial court was both aware of and went beyond the holdings of the United States Supreme Court in *Cuyler* v *Sullivan*, 446 US 335, 100 S Ct 1708, 64 L Ed 2d 333 (1980). *Cuyler* held that:

> "A defendant who shows that a conflict of interest actually effected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler* v *Sullivan, id* 64 L Ed 2d 347.

No litigant in this case seriously questions what the legal standards in this area are. Respondent exhaustively briefed this issue for Michigan appellate courts, citing and discussing over 30 appellate decisions from Michigan and all levels of the federal judiciary. This case does not hinge around an interpretation of the law, but hinges around reading the thousands of pages from the trial and post-trial

poceeedings necessary to render a decision. The appendix prepared below is a *partial* reproduction of the opinion of the trial court. Respondent would urge that this court examine the findings of the trial court since this is the basic factfinding document that is really at issue on this case. Respondent is quite confident that this court will find that the scope and significance of the finding of the trial court more than meets the standards set forth in *Cuyler* v *Sullivan, supra.*

CONCLUSION

Petitioner has demonstrated no need for this court to assert its jurisdiction to hear this case.

WHEREFORE, respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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II.

A.

After hearing the evidence, ordered in the remand, I find, as I did in my July, 1980, opinion, that the defendant, Raymond Gallagher, was denied the effective assistance of counsel.

I stand by that opinion except as elaborated on or corrected in this one.

Let me examine the conflict of interest issue more thoroughly than I did in my July 15th opinion from the bench. I shall deal with these questions:

What are the legal rules and standards governing the conduct of lawyers respecting conflicts of interest?

Under these rules and standards, was Norman Lippitt involved in a conflict of interest?

Did the conflict of interest detrimentally affect Lippitt's representation of Gallagher?

Was the conflict of interest harmless respecting the outcome of the case?

B.

The legal rules and standards concerning conflict of interest come primarily from the Code of Professional Responsibility and the case law.

Canon 5 of the Michigan Code of Professional Responsibility provides:

> "A lawyer should exercise *independent* professional judgment on behalf of a client." (Emphasis supplied).

Disciplinary Rule 5-101(A) provides, (6) insofar as pertinent:

> "Except with the consent of his client after full disclosure a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or *reasonably may be affected* by his own financial, business, property, or *personal interests*." (Emphasis supplied).

Canon 4 states:

"A lawyer should preserve the confidence and secrets of a client.

"(B) . . . a lawyer shall not knowingly use a confidence or secret of his client to the disadvantage of the client."

In *People* v *Garcia*, 398 Mich 250, the Michigan Supreme Court announced the standard for effective assistance of counsel. It is a twofold test. First, a lawyer must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Second, a lawyer "must conscientiously protect his client's interests undeflected by competing considerations."

Under the Code of Professional Responsibility and the *Garcia* case, Lippitt was involved in a conflict of interest. He could not properly use any confidence or secret of B.S. to the advantage of Gallagher, but to B.S.'s disadvantage. At the time he undertook to represent Gallagher, around March of 1979, or very soon thereafter, his professional judgment in Gallagher's case might reasonably be affected by his personal interest in and concern for B.S. He had had a personal and professional relationship with B.S. Although his attorney-client relationship with B.S. had ended in March (7) of 1978, the personal relationship pre-dated the professional relationship and continued after the professional relationship ended. A lawyer who ceases to represent a client may, nevertheless, be held to be involved in a conflict of interest between his former client and a present client; *Tucker* v *US*, 235 F 2d 238 (1956, CA 9, Cal); *Taylor* v *US*, 96 App DC 379, 226 F 2d 337 (CA 2, NY, 1967), cert den 389 US 874, reh den 389 US 964.[3] Moreover, Lippitt did not protect Gallagher's interests undeflected by competing considerations of B.S.'s interests.

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3 Because B.S. was not a client, but a former client, of Lippitt during Lippitt's representation of Gallagher, DR 105 of the Code of Professional Responsibility is not strictly applicable. Nevertheless, the spirit and purpose of DR 105 may influence and guide judges in the formulation of legal rules. DR 105(A), (B), and (C) provide:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is

(Footnote continued on page 3a)

C.

Having made these conclusions of law and findings of ultimate fact, let me recite the detailed facts and evidence on which the findings of ultimate fact are predicated.

The people's theory and evidence pointed to only one person as the originator and instigator of the plot to assassinate Leon Sommers; this person was Raymond Gallagher.

The conflict of interest between Gallagher and B.S. became apparent when information came to Lippitt which tended to show that his former client, B.S., had a motive to kill Leon Sommers; and which tended to make B.S. the principal "alternate suspect." Some of this information indicated that B.S., rather than Gallagher, originated the homicidal plot, paid for the hit men and paid for Edmonds' services, as an intermediary in hiring them.

This information came to Lippitt early in March of 1979, soon after he had been retained by Gallagher. It had already been stated that Lippitt's relationship with B.S. (8) was personal as well as professional. Lippitt and B.S. have known one another since they were high school students. They attended different schools, but saw one another at social and recreational events. They are about the same age—in their early forties. The nature of the relationship between Lippitt and B.S. will be explored more fully later in this opinion.

(Footnote continued from page 2a)

likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

"(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

"(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Gallagher had and continues to have an interest in being acquitted of the Sommers' killing. B.S. had and continues to have an interest in his reputation and in not being prosecuted for murder or any other offense. When the information implicating him in the Sommers murder reached Lippitt, B.S. was on probation on a cocaine related charge. To pursue Gallagher's "alternate suspect" defense vigorously was to jeopardize B.S.'s interests. To pursue B.S.'s interests was to jeopardize the interests of Gallagher.

The marshalling of evidence that would tend to cast suspicion on B.S. would be helpful to Gallagher, but harmful to B.S. The production of evidence at trial focusing suspicion on B.S. would have the same effect. For Lippitt to use any secret or confidence of B.S. to B.S.'s disadvantage would violate Canon 4 of the Code of Professional Responsibility.

(11)

D.

The next question is, did the conflict of interest affect Lippitt's representation of Gallagher? Or, formulated in the language of *Garcia*, did Lippitt "conscientiously protect his client's interests undeflected by competing considerations?" The evidence shows that Lippitt's concerns for B.S. affected and "deflected" his judgment in the representation of Gallagher. The evidence shows that the conflict of interest detrimentally affected (12) Lippitt's performance as Gallagher's advocate. The conflict of interest had a detrimental affect on Gallagher in both the investigative phase of trial preparation and in the trial itself. The evidence shows that there were acts and decisions on the part of Lippitt, detrimental to Gallagher, that have no explanation other than Lippitt's concerns for B.S., his friend and former client.

(12a)

There was testimony from Gallagher, which rang true, that Lippitt told Gallagher that he had an outstanding investigator, Robert O'Neil, who would skilfully investigate the potential defense of "alternate suspect." Mr. Lippitt's description of O'Neil was correct. O'Neil has had a wealth of training and experience as an investigator. He obtained 20 years of this training and experience as an agent of the Federal Bureau of Investigation. O'Neil retired from the U.S. Navy as a captain. O'Neil testified in the July, 1980, hearing without discussing his testimony in advance with Lippitt, who was unavailable. Much of my July decision is based on O'Neil's testimony.

Lippitt employed and directed O'Neil. O'Neil reported to Lippitt and was paid by Lippitt. With respect to O'Neil, Lippitt did an astounding thing. He did so soon after being hired by Gallagher and after having been informed that B.S. had expressed fear that Sommers would inform on B.S. like he had on Gallagher. He did so after being informed that B.S. told Gallagher, who had been given a stay of sentence in his Dyar Act case, that Gallagher should turn himself in to start serving his prison term, because something was going to happen to Sommers. (13) When Lippitt took the astounding step, he had also been informed that Edmonds had admitted that B.S., and not Gallagher, arranged the hit on Sommers. The astounding thing Lippitt did, after getting this information, was to order O'Neil to stop investigating any information or leads that could direct suspicion on B.S.

(15)

Mindful of this information, Lippitt stopped the investigation of B.S., and the only reasons Lippitt gave O'Neil for the "stop order" were that B.S. had a good reputation and was not the kind of person to become involved in hiring a "hit."

This was Lippitt's explanation to O'Neil, despite the fact that Lippitt represented B.S. when he was convicted of

a federal narcotics offense. Furthermore, early on, there was a substantial amount of information that had come to Mr. Lippitt which tended to show that B.S. had anything but a good reputation in the community in which he lived and worked, and, indeed, to the contrary, that he had acquired a reputation of being involved in the purchase and sale of stolen auto parts and in dealing in narcotics—particularly cocaine—with Leon Sommers working for B.S. in these criminal enterprises. Also, when Lippitt gave O'Neil reasons for dropping the investigation Lippitt had information that B.S. was feared by members of the underworld with whom he associated. We will return to this subject.

Moreover, one must seriously question Lippitt's ability to make a neutral and objective judgment concerning the potential of his friend and former client to finance and arrange an assassination of a man whom he perceived as a risk to his freedom. Jesse Pickerel was one of the persons interviewed by (15a) O'Neil. He gave O'Neil a statement in which he said that at times B.S. behaved like a "madman."

As pointed out earlier, even before Lippitt "called off" O'Neil, he was protective of B.S. At the very outset, Lippitt had spoken at length to Gallagher's sister and to Karen Ahleong, the mother of Gallagher's child. They gave Lippitt the names of persons who associated with Gallagher and who could have had a motive either to kill Sommers or to "frame" Gallagher. Both ladies mentioned B.S.'s name, among others. After this discussion, Lippitt left a "memo" for O'Neil at Lippitt's office. This memo contained the names of seven or eight persons to be investigated or interviewed. B.S.'s name was omitted. O'Neil started his investigation without notice that B.S. might be an "alternate suspect."

Lippitt "called off" O'Neil when O'Neil brought Lippitt information which cast suspicion on B.S.

If "calling off" O'Neil in the very beginning of the case before the "facts were in" was not a deliberate coverup, it

was a hasty, ill-formed, ill-considered judgment, not grounded on any facts. Lippitt's belief that B.S. would not participate in a conspiracy to murder seems to have been based, not on facts but on intuition and feelings. I cannot conclude that the decision was grounded in strategy or considerations of time or defense resources. I will discuss these possible explanations later. I find that Lippitt's decision not to conduct any investigation that would cast suspicion on B.S. was rooted in Lippitt's concern for the welfare of B.S.

E.

The next question is whether the calling off of the investigation of leads to B.S. was detrimental to Gallagher.

Someone said that success in the trial of a criminal case is 1/10 inspiration and 9/10 preparation. Preparation of the facts is particularly important. The preparation of the "alternate suspect" defense was cut short by Lippitt.

(16, 17)

After being directed to stop investigating leads to B.S., Robert O'Neil interviewed some thirty witnesses, approximately three-quarters of all the persons he interviewed during the entire case. After the direction from Lippitt, which could have come as early as March 9, 1979, and not later than the end of March, 1979, O'Neil did not initiate any inquiry concerning B.S.'s motive to be involved or his involvement in the assassionation. While O'Neil did not close his ears if a person volunteered information about B.S., he did not probe further with questions or with any attempt to obtain evidence concerning B.S. that would be admissible in court or useful in cross-examination, or with any attempt to obtain information that could lead to such evidence.

Once O'Neil was "called off" the investigation of leads to B.S., he was never again directed to return to the investigation.

It should be noted that Lippitt, himself, did almost no investigating. The only investigative work that Lippitt performed was to interview Gallagher and Robert Wind at Milan Prison. Prison authorities would not permit O'Neil to interview these men, personally, because he was not their lawyer. Except for the minor investigative effort by Lippitt, he relied completely on O'Neil for the investigative phase of preparation for trial.

F.

Moreover, Lippitt "called off" the investigation without informing Gallagher and without obtaining his consent. In a matter so delicate and important as the investigation of leads focusing suspicion on Lippitt's former client, the duty of effective representation required Lippitt to disclose to Gallagher the plan to stop the investigation and to inform him of the possible effect of such a decision. 4 Lippitt did not obtain the informed consent of Gallagher.

(20)

Here, we have a host of leads and information, arising before trial, and focusing suspicion on B.S. as the instigator of the conspiracy. *Garcia's* lawyer of ordinary training and skilled in the criminal law would have a duty to see to it that the information and leads were investigated. Norman Lippitt did not do so. He did the opposite. He "called off" his investigator.

While it is difficult to know exactly what evidence would have been turned up in a conscientious investigation by O'Neil of the "B.S. leads," the evidence shows a strong probability that Gallagher was prejudiced by Lippitt's suppression of the investigation.

(21)

Lippitt now admits that it was a mistake on his part not to cross-examine Hastings in this manner. But when one looks at the evidence as a whole, one does not see an

4 Compare Canon 5, DR 5-105(C), supra.

inadvertent error on Lippitt's part; one sees another example of Lippitt's coverup of B.S.

Clearly, Robert Wind had sufficient information to testify that the mysterious Swanson was really B.S. Whether he would have gone so far as to say so on the witness stand is questionable. Lippitt, of course, didn't ask Wind whether he knew that "Swanson" was merely an alias for B.S.

Lippitt testified that he did not want to impeach Wind on the issue whether Wind knew that Swanson * * *

(24)

There were potential witnesses available to Lippitt who knew or who believed on the basis of evidence, "harder" than mere reputation evidence, that B.S., like "Swanson," was in the narcotics and the "hot" car parts business.

Among these potential witnesses were Harry Traylor, Pierre Alexander, Sergeant Chester Hastings, and Raymond Gallagher. Even Antolak might have given such testimony. 5a These witnesses or potential witnesses were not asked for their knowledge of B.S.'s illegitimate activities.

Moreover, a public federal court record was available to show that B.S. was indicted on a charge of participating in large scale narcotics conspiracy and was convicted of possession of cocaine on his guilty plea, after a plea bargain, pursuant to a certain federal court rule.

Another public record, an assumed name certificate, was available to show that B.S. was in the car parts business on X Road.

B.S.'s affluence could be demonstrated by the location and nature of his home and by the kind of cars he owned and drove.

(25)

Edmonds' brother-in-law, and partner, Harry Traylor, was willing and able to testify that Edmonds had transacted business in stolen parts with B.S. Traylor was not ques-

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5a Indeed, Edmonds, on cross-examination, admitted that he delivered a "hot" front end of an automobile to the victim, Leon Sommers, at X Auto Parts Co. But Lippitt made no attempt through other witnesses to show that B.S. was the owner of X Auto Parts Co.

tioned to elicit such testimony. Traylor had "eye-witness knowledge" on which such testimony could be based. Many of Edmonds' transactions in the stolen car business were also Traylor's. Traylor's testimony at trial was favorable to Gallagher in all respects. In his testimony, Traylor freely admitted that he made his living as a car thief.

Lippitt made no attempt to elicit testimony which would show that B.S. fit the description of Swanson. Lippitt made no attempt to offer documentary evidence to show that Swanson and B.S. were one and the same.

(28, 29)

Did the conflict of interest, in which Lippitt involved himself adversely, affect Gallagher's defense? Clearly, it did. To sum up, Lippitt, very early in his representation of Gallagher, ordered his "crack" investigator not to follow any leads that gave promise of turning up evidence that would focus suspicion on B.S. although the leads were plentiful and promising.

(30)

* * * stand to testify that he knew Swanson or had ever met him. Gallagher came off looking like a drowning man grasping for a straw that wasn't there. The persons who knew Swanson, alias B.S., as a living reality were not called as witnesses. The able Mr. Lippitt ineptly presented the defense of "alternate suspect." I conclude that Lippitt's incisive mind and keen ability were blunted by concern for his friend and former client. Lippitt's handling of the defense of "alternate suspect" will be discussed at greater length when I deal with Lippitt's argument that strategy rather than concern for B.S.'s interests determined his decisions throughout the entire period of Lippitt's representation of Gallagher.

The conclusion is inescapable that Lippitt's defense of Gallagher in preparation for trial and in trial was adversely affected by the conflict of interest in which Lippitt was involved.

K.

Let me leave Lippitt's actual pre-trial and trial performance to discuss other subjects more fully than I have up to this point—the subjects of trial strategy, time, money and priorities. At the post-remand hearing, Lippitt attempted to show that considerations of time, money, and trial strategy caused him, a long time after he was retained to direct his investigator to give a low priority to following up any leads which would cast suspicion on B.S. He tried to show, also, that strategic considerations caused him not to cast B.S. in the role of "alternate suspect, number 1," at trial.

The evidence is strongly against Lippitt on all of these propositions. The evidence demonstrates the following facts.

It was not late in the "game," but in the first few "innings" that Lippitt directed the investigation (31) away from his former client. Lippitt was retained in late February, or very early March of 1979. Lippitt "called off" O'Neil in the first in-person meeting between the two after Gallagher retained Lippitt. He "called off" his investigator before the month of March was over.

When Lippitt called off his investigator, time was not a problem. The trial was originally scheduled for mid-August. It was adjourned on defendant's motion to October 2nd.

Lippitt did not instruct his investigator, O'Neil, to give a low priority to investigating leads to B.S.; he "shut off" the investigation completely, early in the game, and never "turned it on" again.

With respect to the claim that funds were limited, funds were not the problem when the investigation of B.S. was terminated in March. Monies were paid to Lippitt by Gallagher and his family in advance against Lippitt's charges of $100 an hour and O'Neil's charges of $25.00 an hour. As of late May, Gallagher's account still had a substantial balance. It was not a shortage of money that closed down the investigation of B.S. in March.

Thus, before enough evidence had been gathered to fully develop defense strategy and before time or money became a problem, and without sufficient information to permit a reasonable judgment that B.S. could not be tied in as an "alternate suspect," Lippitt made a decision, concerning the investigation, favorable to his former client and detrimental to Gallagher. The decision, *in limine*, is not even debatably justifiable as a strategy decision that a lawyer of ordinary training and skill in the criminal law could make. *People* v * * *

(33)

When the first three priorities were substantially completed, there was adequate money available for investigation of the B.S. leads; Gallagher had a substantial credit in his account with Lippitt; three months remained until trial.

The trial began on October 2, 1979, with a non-jury evidentiary hearing. Lippitt had obtained a mortgage on Gallagher's home to secure payment of $20,000.00. On or about September 19, 1979, Lippitt received payment of $20,000.00 following the sale of Gallagher's home.

The trial started with a lengthy evidentiary hearing concerning alleged intimidation of witnesses by Taylor police officers. Before the presentation of proofs to the jury began, there was time and money, enough, for an investigation of "B.S. leads" which gave promise of making the defendant's "alternate suspect" theory come alive.

Gallagher testified that he paid Lippitt over $72,000.00 in fees, including payment for O'Neil's services as an investigator. Lippitt testified that his firm received about $58,000.00, exclusive of what was paid to others, including O'Neil, in costs and expenses. A large amount of the fee resulted from the great length of the trial and the more than average number of hours per trial day. Both Lippitt and O'Neil were present at the trial every day.

It is fair to say that a shortage of money is not the reason that investigation of leads to B.S. was ended in the

first month of Lippitt's retention and was never resumed at any time before the trial.

I do not question the proposition that money problems arose some time after the 6-week trial got under way. With the fees piling up at $750.00 per day or more, a (33a) six-week trial would use up about $18,000.00 in fees; not to mention costs. But when Lippitt made his decisions to call off and not to reopen the investigation of B.S., no one, least of all Lippitt, expected that the trial would last for anywhere near six weeks. Long before the trial began, when there was no money shortage, Lippitt made his decisions to "call off" O'Neil. After the high priority investigative work was completed, plenty of money remained to return to the investigation of B.S. But Lippitt did not do so. Thus, time, money and priorities do not explain Lippitt's suppression of the investigation of B.S.

(34)

I have mentioned the conversation between Lippitt and his associate, Steven Sinkoff, concerning Swanson. Lippitt was not forthright with Sinkoff. Lippitt spoke to Sinkoff as though there might be a genuine living person named Swanson. He concealed from Sinkoff the fact that Swanson was B.S. He concealed from Sinkoff the fact that B.S. was a former client.

(35)

Lippitt never revealed to Sinkoff that B.S. was the owner of X Auto Parts Co., although the named business had a prominent role in the case. Nothing in the file revealed B.S.'s connection with X Auto Parts. Lippitt did not reveal to Sinkoff that B.S. and Sommers worked together in stolen car, stolen car parts, and narcotics deals. Nor did anything in the file disclose the illicit association of B.S. and Edmonds in the "hot" car parts business. Lippitt did not reveal to Sinkoff that B.S. had dealings with Antolak and Traylor involving stolen cars, stolen auto parts, or illicit drugs. Nor did the file reveal such information.

Lippitt never revealed to Sinkoff that B.S. was a former client of Lippitt's. Lippitt stripped the office file on the Gallagher case of references to B.S. For example, O'Neil's written memo to Lippitt containing information from Gallagher about B.S. was never seen by Sinkoff although Sinkoff had unlimited access to the file, did a great deal of work on the case, and was completely familiar with the file. This is the memo in which there is outlined B.S.'s great fear that Sommers implicated him in his testimony in the Dyar case; B.S.'s statement that Sommers could put him away for a long time because Sommers knew so much about B.S.'s illicit activities; Sommers' employment by B.S. in hot car parts and narcotics dealings; and B.S.'s statement that something should be done about Sommers.

(37, 38)

So complete was the cover-up of B.S. within the Lippitt office that when the trial began, Sinkoff did not know that B.S. had been Lippitt's client; that Lippitt represented B.S. in a case in which Robert Wind was a co-defendant; that Swanson was B.S.; that B.S. was owner of X Auto Parts; or that Sommers, Edmonds, Antolak, and Traylor had illicit dealings with B.S.

This is very significant in view of the role that Sinkoff had in this case, a role which Lippitt underportrayed in his testimony. Sinkoff was Lippitt's principal assistant in this case. He assisted Lippitt in the preparation of both the facts and the law. Sinkoff presented a large portion of the proofs in the evidentiary hearing on the issue of intimidation of witnesses by the police. He wrote the brief on this issue. Sinkoff argued the original motion for a new trial and wrote the brief in connection with this motion. He had full access to the office file in the Gallagher case.

(45, 46, & 47)

The Michigan Supreme Court reversed the Court of Appeals. The Supreme Court held first that the lawyer appointed to represent the two defendants was involved in a

conflict of interest, which deprived defendant Bentley of his right to counsel. The Supreme Court said:

> ". . . [W]e reach the remaining question whether this error can be said to have been harmless beyond a reasonable doubt. We conclude that denial of the right to effective assistance of counsel in this case is so offensive to the maintenance of a sound judicial process that it cannot be regarded as harmless error."

The Michigan Supreme Court in *Bentley* cited *People* v *Mobley*, 390 Mich 57, and *People* v *Robinson*, 386 Mich 551, cases which hold that certain violations of a defendant's rights are so offensive to sound judicial process that they can never be considered harmless errors.

Thus, *Bentley* can be taken to mean that when a defendant in a criminal case is denied effective assistance of counsel, because his lawyer is involved in a conflict of interest, the violation of his right can never be treated as harmless. *Glasser* v *US*, 315 US 60, 92, also can be interpreted as holding that ineffective assistance of counsel resulting from a conflict of interest that adversely affects counsel's performance can never be regarded as harmless.

Even if this is not a correct interpretation of the *Bentley* and *Glasser* cases, there is an abundance of authority to the effect that violations of a defendant's constitutional rights may not be treated as harmless, unless shown by the prosecutor to be harmless beyond a reasonable doubt. *People* v *Robinson*, 386 Mich 551; *People* v *Wichman*, 15 Mich App 110; *Chapman* v *California*, 386 US 18. 7

The evidence in the instant case shows that Gallagher was denied effective assistance of counsel by reason of Lippitt's involvement in the conflict of interest between B.S. and Gallagher.

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7 In *Chapman*, the U. S. Supreme Court said, ". . . before . . . a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The people have failed to show beyond a reasonable doubt that the effect of the conflict of interest was harmless. Indeed, the preponderant evidence shows that the denial of effective assistance of counsel by reason of the conflict of interest played a causal role in producing a verdict of guilty.

Cuyler v *Sullivan*, 48 Law Week 4517, Docket 78-1832, decided by the U. S. Supreme Court in May of 1980, is cited by the people, but does not help them. It holds that a mere possibility of defense counsel being involved in a conflict of interest does not warrant a new trial. In the instant case, we have much more than a possibility; we have a demonstrated conflict of interest. Moreover, in *Cuyler*, defense counsel fully and carefully informed his client about the decision whether to testify. After the defendant was fully informed, he concurred with the decision of his lawyer not to have him take the witness stand. This is unlike the Gallagher case in which Lippitt, without Gallagher's informed consent, terminated the investigation of B.S. and conducted the trial in such a way as to direct attention away from Lippitt's former client, B.S., as an alternate suspect.

In *Cuyler*, the U.S. Supreme Court made it clear that once a trial court decides that a conflict of interest adversely affected a lawyer's representation of his client in a criminal case, the trial court should not indulge in nice calculations concerning the amount of prejudice attributable to the conflict. In *Cuyler*, the U.S. Supreme Court said:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."

In the instant case, Gallagher has demonstrated that Lippitt tried to act on behalf of conflicting interests to Gallagher's detriment; Gallagher is entitled to relief.

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